ORIGINAL (21)

IN THE SUPREME COURT OF THE UNITED STATES

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No. 97-454

UNITED STATES OF AMERICA, PETITIONER

v.

BESTFOODS (FORMERLY CPC INTERNATIONAL INC.), *ET AL.*, RESPONDENTS

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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OPPOSITION OF RESPONDENT BESTFOODS TO MOTION FOR DIVIDED ARGUMENT

Respondent Aerojet-General Corporation and its subsidiaries ("Aerojet") have moved under Rule 28.4 to divide the argument time available to the respondents in this case. If the Court were to grant this motion, it would make a mockery of the adversary process. As we explain below, Aerojet has admitted that it is not adverse to the United States on the sole question on which certiorari was granted. Indeed, Aerojet strenuously *supported* the government's position on that question in the court of appeals. Moreover, Aerojet also has admitted that it has no stake in the outcome of the question presented. In these unique circumstances, the Court should act to ensure that the oral argument consists of a legitimate adversary presentation of the issues — not just by denying Aerojet's frivolous motion, but by directing that the argument for respondents be presented by counsel for Bestfoods ("CPC").

1. At the petition stage, Aerojet conceded that it does not have "a significant enough financial interest in the question" before this Court "to present the adversity necessary for proper

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presentation of the issue in this Court." Aerojet Br. in Opp. 4 n.1. Aerojet explained that, under an agreement upheld by the Michigan courts, the State of Michigan would be responsible for any CERCLA liability that may be apportioned to Aerojet (*id.* at 4), and it acknowledged that this lack of financial risk meant that Aerojet's posture in this case deprived it of the "adversarial nature * * * necessary for careful adjudication of the issues." *Id.* at 12. See also No. 97-296 U.S. Br. 7. Aerojet's interest is *exactly* aligned with Michigan's; that is why Michigan did not even name Aerojet as a respondent in its separate petition from the same judgment, No. 97-296.

In addition, Aerojet apparently is at the brink of (if it has not already reached) a settlement agreement that, if approved, would excuse Michigan from liability by excusing Aerojet from the obligations it would accrue as a *present* owner and operator of the Muskegon site as well as a past owner and operator. The United States disclosed the advanced stage of those negotiations some months ago and suggested that those negotiations would continue while this case was pending (see No. 97-296 U.S. Br. 9-10 n.4). If Aerojet indeed has reached settlement terms with the United States and Michigan, it plainly has no standing to present its views supporting those parties as a sham respondent here.

2. Moreover, in the courts below *Aerojet agreed with the United States on the single legal question presented in this case*, and argued against the standard urged by CPC and adopted by the Sixth Circuit. See U.S. Br. 48 (citing Aerojet C.A. Br. as Appellee 32). Thus, Aerojet contended in the court of appeals that CERCLA liability could be imposed on a parent corporation that "actively participated in and exerted control over the operation of its wholly-owned subsidiary." Aerojet C.A. Br. as Appellee 28. See also, *e.g.*, *id.* at 36 (arguing that CPC should be liable as "[a] parent corporation * * * that participates actively in its subsidiary's operations while the subsidiary

is causing pollution"). Aerojet also argued that state-law veil-piercing analysis had no place whatsoever in determining whether a parent corporation "operated" a facility operated by its subsidiary (*id.* at 34-35) and explicitly rejected any "distinction between operation of a subsidiary corporation and operation of" a facility as defined in 42 U.S.C. § 9601(9). *Id.* at 32 n.19.

3. Aerojet now professes to have changed its views on the question presented. Motion, p. 1. But its three pages of perfunctory legal argument on the issue (Aerojet Br. 24-27), which lack even a single citation to authority other than general statements in the legislative history, belie that contention and fulfil Aerojet's prediction (Br. in Opp. 4 n.1, 12) that its lack of adversity would prevent it from making a "proper presentation" on the only legal question that this Court has accepted for review.

One thing is unchanged about Aerojet's position, however: it remains aligned with the United States with respect to *CPC's liability* under CERCLA for the operations of its subsidiary. Aerojet's distorted statement of facts (Aerojet Br. 6-15), as well as much of its legal argument (*id.* at 36-37), are devoted to showing why the judgment should be *reversed* as to CPC. CPC, by contrast, urges a complete affirmance of the judgment below as to all parties. It would be a disservice to the Court, and a gross injustice to CPC, to take part of the oral argument time allocated to the *respondents* and give it to a party that agrees with the *petitioner*.

4. Aerojet uses most of its brief to this Court (see Aerojet Br. 27-36, 38-46), and proposes to spend some or all of its argument time (see Motion, pp. 1-2), addressing issues — whether disposal occurred while the Aerojet subsidiaries operated the site, and the availability of certain defenses — that the court of appeals did not definitively resolve. Specifically, because the Sixth Circuit questioned whether the record supported the findings adverse to Aerojet on those points, it

remanded for the trial court to "indicate with greater specificity precisely which portions of the record it relies upon [for] support." Pet. App. 22a (disposal). See *id.* at 22a-24a (defenses). Those plainly interlocutory issues were not raised in the petition for a writ of certiorari and were not briefed by the United States. Contrary to Aerojet's apparent belief (see Motion, pp. 1-2), were this Court to reverse the judgment with respect to the question that *was* presented, the Sixth Circuit's resolution of the extraneous issues would not dissolve "into a judgment against Aerojet." Rather, the remand order would remain in place.

In sum, Aerojet has no stake in the issue that the Court will decide and proposes to use its argument time as respondent (1) to seek reversal of a portion of the judgment below and (2) to debate irrelevant questions that are not before the Court. If Aerojet requires argument time, that time should come from the government, whose position with respect to the judgment against CPC Aerojet supports. Aerojet should not be permitted to make a travesty of the oral argument in this case by undermining the full and fair presentation of the issues before this Court by the one party that *is* adverse to the petitioner and that *did* seriously brief the question presented.

It is therefore respectfully submitted that the motion for divided argument should be denied.

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